

Jordan



**The Comptroller General  
of the United States**

Washington, D.C. 20548

## **Decision**

**Matter of:** Monarch Enterprises, Inc.

**File:** B-233303 et al.<sup>1/</sup>

**Date:** March 2, 1989

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### **DIGEST**

1. Contracting officer properly based contract award decisions on disparate evaluation scores of the same proposal by different technical evaluation panels (TEPs), where the TEPs reasonably found protesters' proposal lacking sufficient information to warrant most awards and protesters' "all or none" options prevented it from award of contracts to which it might otherwise have been entitled.
2. Protests that agency used predetermined cut-off scores in violation of agency procurement regulations are denied where protester suffered no prejudice due to its significantly lower scores and inclusion in the competitive range despite those scores.
3. Protests alleging evaluations were used to improperly favor former agency employees and contractors are denied where protester fails to meet its burden of proof that there was bad faith or bias on the part of contracting officials.
4. Agency awards of contracts to individuals do not create prohibited personal services contracts where, under the terms of the contracts, the contractors' employees will not be subject to direct government supervision.

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### **DECISION**

Monarch Enterprises, Inc. (MEI), protests awards under request for proposal (RFP) Nos. DU203-C-88-0001 through 0014, -0016, -0017, and -0020 issued by Region III, Department of Housing and Urban Development (HUD), for the performance of valuation technical reviews, mortgage credit

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<sup>1/</sup> B-233305; B-233306; B-233307; B-233308; B-233331; B-233332; B-233333; B-233334; B-233335; B-233336; B-233337; B-233338; B-233339; B-233340; B-233341; B-233342; B-233887.

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technical reviews, and insurance endorsement processing in seven HUD field offices.<sup>2/</sup> MEI contends that its proposals were not properly evaluated and that the procurements violate prohibitions against personal services contracts.

We deny the protests in part and dismiss them in part.

The RFPs were issued to procure from independent contractors on a requirements basis the review of the underwriting decisions of private mortgage lenders under Federal Housing Administration (FHA) programs. Under these contracts, valuation reviews are made of fair market appraisals of properties for which there are applications for FHA insurance; mortgage credit reviews are made of the qualifications of FHA mortgage applicants; and insurance endorsement reviews are made of mortgagee loan approval documents.

Proposals were to include a description of how the tasks and sub-tasks of the statement of work would be accomplished; a discussion of plans for pick-up and delivery of work; identification of the methods of personnel training and management control to be applied to ensure timely, professional, and quality performance; a clear statement of plans for project management; description of the plan and capacity for responding to significant changes in workload; an organizational chart for the project showing the names of project manager and key personnel; and a brief resume for each person proposed to work. Where consultants or subcontractors were to be used, offerors were expected to describe their employment arrangements and to include resumes of their key personnel.

Proposals were evaluated on the basis of five factors: extent to which the experience of the offeror demonstrates the knowledge and capabilities to perform the specific services involved (30 points); demonstrated capacity to perform the estimated need and provide additional workload capability to meet estimated increases in need (25 points); demonstrated capability of proposed key personnel and subcontractors to perform the specific service involved (15 points); extent to which the proposal demonstrated an understanding of the work requirements of the specific service involved (15 points); and extent to which the proposal demonstrated an explicit and feasible management plan for timely pick-up and delivery of cases, performance of work, and quality control (15 points). Price was of

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<sup>2/</sup> Philadelphia and Pittsburgh, Pennsylvania; Charleston, West Virginia; Wilmington, Delaware; Richmond, Virginia; Washington, D.C.; and Baltimore, Maryland.

secondary importance and award was to be made to the responsible offeror whose proposal was most advantageous to the government. HUD also provided for the possibility of making multiple awards for each service in each city.

MEI submitted the same proposal in response to all solicitations, but offered different unit prices for each service in each city. Though it sought award of all contracts, it stated it would consider less than the total package. Under "tasks and methods" MEI briefly outlined whether it would work in or outside of HUD offices and its approach to staffing: "initial subcontract offers to all of those former contractors and/or former HUD employees already trained and capable of quality work performance" and "employment of new hires who will be trained by key personnel of [MEI]." MEI also stated that it would pick-up, complete, and return work to the offices with overloads to be handled by nearby offices or the MEI central office (in Georgia), and it promised to timely complete all work.

Under "organization and personnel," MEI named its overall project manager, a former HUD employee, and provided his resume. It also named two other MEI home office staff members and briefly described their relevant experience. There was no identification of the key personnel or subcontractors who actually would perform the services in the various cities.

Under "prior and current experience" MEI noted that it handled the HUD overload endorsement cases in Jacksonville, Florida and the 1987-88 endorsement workload for the Orlando, Florida HUD office. It also anticipated award for all three services in HUD offices in Tulsa, Oklahoma and San Antonio, Texas.

More than 79 proposals were received in response to the 17 RFPs and separate technical evaluation panels (TEPs) were appointed for each field office. A predetermined acceptability cut-off score of 70 was set in Philadelphia, Baltimore, and Washington, and a score of 75 was set in Richmond. The remaining cities did not provide for a cut-off point. MEI was only rated technically acceptable for some services in some cities. Even though it did not score above the various cut-off points, the contracting officer determined to include MEI and other low scoring offerors in the competitive range. The contracting officer conducted telephone discussions with MEI and other offerors to inform them of deficiencies in their proposals and provided an opportunity for submission of best and final offers (BAFOs).

In its BAFOs, MEI provided an organizational chart naming its project manager, but only identifying by title the supervisory subcontractor and the staffs for the different services. It then explained its "basic approach," which was to select a supervisor-subcontractor to be responsible for all contract functions in each office and who would select the appropriate staff to perform the required services. For each city MEI named one to three specific individuals with whom it was negotiating for the position of supervisor-subcontractor. All had expressed some interest, but no evidence of a clear commitment to work for MEI was submitted. In Philadelphia, Pittsburgh, and Richmond, the potential supervisor-subcontractors also were offerors for one or more of the services in those field offices. In Washington, one of the three potential subcontractors also was competing for the mortgage review contract.

As part of its BAFO, MEI also provided five alternative offers: (1) all or none, all offices and services; (2) all or none with respect to Washington only; (3) all or none with respect to Philadelphia only; (4) all or none with respect to Pittsburgh only; and (5) combinations of options 2, 3, and 4, i.e., all three, any two, or any one.

MEI's scores<sup>3/</sup> for its original/BAFO proposals are as follows:

<u>Field Office</u>	<u>Valuation</u>	<u>Mortgage</u>	<u>Insurance</u>
Philadelphia	30/30	30/30	55/55
Pittsburgh	30/30	35/59	60/60
Charleston <sup>4/</sup>		20/20	30/30

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<sup>3/</sup> No scores are reflected for Wilmington because no evaluation of any proposals was made. HUD explains that the insurance endorsement service solicited for Wilmington is minimal in that field office and the agency has not yet decided whether to contract for those services. Thus, we find MEI's protest with regard to this solicitation (B-233308) is premature. See ECS Metals Limited, B-229804, Feb. 10, 1988, 88-1 CPD ¶ 136.

<sup>4/</sup> No scores are reflected for valuation services in Charleston or insurance processing in Washington because these services were not solicited.

Baltimore <sup>5/</sup>	5/5	5/5	75/75
Washington	55/55	55/100	
Richmond	16/78	16/78	16/78

The scores<sup>6/</sup> of other offerors' original/BAFO proposals ranged as follows:

<u>Field Office</u>	<u>Valuation</u>	<u>Mortgage</u>	<u>Insurance</u>
Philadelphia	90-25/100-30	100-85/100-85	90/100-85
Pittsburgh	93-65/98-76	100-69/100-87	
Charleston		75/75	
Baltimore	90-57/90-62	85-42/100-55	
Washington	100-60/100-85	100-15/100-15	
Richmond	98-78/98-82	98-79/98-88	95-80/98-80

The TEPs generally agreed that MEI's proposal was lacking in sufficient specificity or detail to warrant very high scores. For example, the Washington panel found that MEI's proposal did not demonstrate that it had any knowledge or experience to perform the valuation or mortgage reviews. However, the Baltimore and Pittsburgh panels did find such evidence for insurance services, apparently based upon MEI's Florida experience. The Charleston panel found that the proposal did not demonstrate the capacity or the capability to perform the required services. The panels in Baltimore and other cities found it impossible to judge the capabilities of MEI's unnamed subcontractors and key personnel. The Charleston panel noted that the proposal contained little information that would indicate MEI had an understanding of the work requirements. The Baltimore panel found that the proposal outlined a general plan for pick-up and delivery, but nothing else.

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5/ MEI's BAFO was not received in time for consideration by the Baltimore TEP and consequently its scores did not change.

6/ MEI was the only offeror to submit a proposal for Insurance endorsement processing in Pittsburgh, Charleston, and Baltimore.

MEI's BAFOs did not result in uniform significant increases in its scores. For example, the Charleston and Philadelphia panels did not find that the BAFOs warranted any increase in MEI's scores and in Baltimore, MEI's BAFO was received too late to be considered. MEI's scores did increase significantly for all services in Richmond, and for mortgage reviews in Washington and Pittsburgh. The higher score in Washington was attributable to MEI's intention to hire a particular subcontractor (a competitor for the same contract) and the TEP suggested that any award to MEI be conditioned on use of the named individual, since otherwise MEI's ranking could be adversely affected.

After evaluations were made of all offerors' BAFOs, the TEPs considered price proposals for those offerors with acceptable scores. In Richmond, MEI was acceptable for all services with scores of 78 points each. In Washington, MEI was acceptable for mortgage reviews, with a score of 100 and was acceptable in Baltimore for insurance services with a score of 75. MEI's final scores were unacceptable for the remaining cities and services. MEI was not awarded contracts for any of these cities due in part to limitations in its alternative offers which provided for acceptance of contracts in Richmond and Baltimore only if it received all other contracts. Similarly, since MEI was unacceptable for valuation services in Washington, and would only accept award of all contracts there, it did not receive an award for that city either.

From October 18 through 21, 1988, the regional contracting officer awarded multiple contracts to various offerors for the services in Philadelphia, Washington, and Richmond. All awardees had scores ranging from 88 to 100 points. Before making further awards, however, on October 20, he suggested to the Housing Division Director that a new TEP be formed to reconcile the disparity in scores given to four multiple office offerors (including MEI) by the various field office TEPs. Since these offerors presented the same proposal information to each office, the contracting officer felt it would be "bad policy" to have an offeror recommended as technically competent and for awards in some cities, but not in others. He specifically suggested that MEI's alternative offers be noted in any review. The contracting officer retired on October 21.

In a November 3, 1988, memorandum to the Office of Administration Director, the Housing Director responded to the contracting officer's memorandum. According to the

Housing Director, the policy of the Regional Housing Division is to support the conclusions of field office TEP's because of their knowledge of local conditions and contractors.

On October 24, 1988, MEI filed its protests of the 17 solicitations. Subsequently, HUD made a determination that urgent and compelling circumstances significantly affecting the government's interests would not permit waiting for the resolution of those protests. Accordingly, it permitted work to continue on the Philadelphia, Washington, and Richmond contracts and awarded three contracts in Pittsburgh for valuation and mortgage reviews and one contract in Baltimore for valuation reviews.<sup>7/</sup>

MEI contends that the contract awards are improper because the various offerors, including MEI, were not fully and fairly evaluated. As support for its contentions, MEI points to the disparate scores it received for the same proposal and the use of predetermined cut-off scores by the panels. MEI also criticizes the agency for requesting BAFOs from it even though it had low scores. Finally, MEI claims that the evaluations were used to promote the hiring of former agency employees and prior individual contractors and that consequently the awarded contracts violate prohibitions against personal services contracts.

The procuring agency has the primary responsibility for evaluating the relative merits of offerors' technical proposals and enjoys a reasonable amount of discretion in the evaluation of those proposals. McLaughlin Enterprises, Inc., B-229521, Mar. 4, 1988, 88-1 CPD ¶ 232. It is not the function of our Office to evaluate proposals de novo. Rather, we will examine an agency's evaluation to ensure that it was reasonable and consistent with the stated

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<sup>7/</sup> In a supplemental protest, MEI challenged the agency's determination of urgent and compelling circumstances because it allegedly did not cover insurance endorsement processing and was not signed by the proper authority. Our review of the determination reveals that it was signed by a proper authority. Even assuming some deficiency with regard to continuation of insurance endorsement processing, MEI is not prejudiced since its protest is denied and thus it would not be in line for award. In general, where an agency makes a determination of urgent and compelling circumstances, it is required to inform our Office (31 U.S.C. § 3553(c)(2) (Supp. IV 1986)) and HUD has complied with this statutory obligation. See National Medical Diagnostics, Inc., B-232238, Dec. 2, 1988, 88-2 CPD ¶ 553.

evaluation criteria. Systems & Processes Engineering Corp., B-232100, Nov. 15, 1988, 88-2 CPD ¶ 478. The protester's mere disagreement with the agency's judgment does not establish that an evaluation was unreasonable. Id., citing Instruments & Controls Service Co., B-230799, June 6, 1988, 88-1 CPD ¶ 531.

MEI, however, claims that the disparity in the scores and the original contracting officer's concern over that disparity establish that the award decisions were not rationally based. We disagree. Disparity in scores alone is not a sufficient basis for finding an improper application of the evaluation criteria by the evaluators. See tg Bauer Associates, Inc., B-229831.6, Dec. 2, 1988, 88-2 CPD ¶ 549. It is not unusual for different evaluators to have disparate, subjective judgments, which are subject to reasonable differences of opinion. See Mounts Engineering, 65 Comp. Gen. 476 (1986), 86-1 CPD ¶ 358. Here, the fact that some TEPs were willing to award higher scores to MEI's generic proposal does not make the lower scores suspect.

MEI used a generic proposal with little more than a promise to hire a sufficient number of competent, experienced subcontractors. Likewise, its BAFOs merely indicated potential subcontractors, some of whom were competing for the same contracts. Where, as here, an agency specifically asks for the qualifications of people who will be directly involved in the project, a promise to hire qualified employees is not sufficient for evaluation purposes. Jones & Company Natural Resource Engineers, B-228971, Dec. 4, 1987, 87-2 CPD ¶ 555; see also Management Services, Inc., 55 Comp. Gen. 715 (1976), 76-1 CPD ¶ 74 (mere proposed use of certain person or subcontractor does not constitute a sufficient assurance of commitment to work by person(s) proposed). Our review of MEI's proposal and BAFOs, as well as the comments and scores of the TEPs, reveals that MEI reasonably was scored low on virtually all evaluation factors for all services. Consequently, we have no reason to doubt the validity and reasonableness of the panels' evaluations or the contract awards. MEI's contentions to the contrary are merely a disagreement with those evaluations and awards.

Further, as implicitly recognized by the contracting officer in his memo suggesting a new TEP, MEI's restrictive, all or none alternatives and prices contributed significantly to its failure to receive any contracts. By restricting its offer to various all or none combinations of services and cities, MEI excluded itself from consideration for individual contracts. An offeror that adds conditions to



its BAFO must bear the consequences of its decision. See Advanced Structures Corp., B-216102.2, B-216102.3, Mar. 28, 1985, 85-1 CPD ¶ 370 (agency properly included price impact of offeror's conditions in its evaluation).

MEI disputes this conclusion and maintains that when its combination contract prices, as opposed to unit prices, are evaluated using the \$250 cost savings provided in Federal Acquisition Regulation (FAR) § 52.215-34 (FAC 84-30),<sup>8/</sup> it would be entitled to contract awards. We disagree. Using the agency's adjusted unit prices (i.e., taking into account the \$250 administrative savings) and the anticipated requirements of the contracts, we find that MEI's restrictive options and relative scores prevented it from receiving any contracts.<sup>9/</sup>

MEI also claims that the awards should be overturned because the TEPs used predetermined cut-off scores in violation of HUD acquisition regulations. Use of predetermined cut-off scores to establish the competitive range is prohibited by HUD Acquisition Regulation § 2415.608(a)(2). However, notwithstanding the use of predetermined cut-off scores by some TEPs for initial evaluations, the agency included MEI and other offerors in the competitive range regardless of their scores. Accordingly, we do not find the evaluations were improperly conducted.

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<sup>8/</sup> FAR § 52.215-34, incorporated by reference in the RFPs, provides that in multiple contract situations, an administrative cost savings of \$250 per contract be considered in evaluating offers. In practice this entails adding \$250 to the cost of each additional contract proposed to be awarded.

<sup>9/</sup> In its comments to the agency report, MEI notes that HUD did not consider the issue of cost realism. We have consistently stated that cost realism generally is not considered in the evaluation of proposals in response to a solicitation for a fixed-price contract. See, e.g., Norden Systems, Inc., B-227106.9, Aug. 11, 1988, 88-2 CPD ¶ 131. Whether an agency conducts a cost realism analysis under those circumstances is within the contracting officials' discretion. Id. Thus, we find no error in any failure to conduct such an analysis in this case.

In conjunction with this claim, MEI criticizes its very inclusion in the competitive range. MEI reasons that if it was so far out of consideration for award it should not have been asked to expend the time and expense of preparing BAFOs. However, the contracting officer's decision to include MEI is consistent with FAR § 15.609(a) (FAC 84-16) which requires the inclusion in the competitive range of all proposals that have a reasonable chance of being selected for award, and provides that "when there is doubt as to whether a proposal is in the competitive range, the proposal should be included." See Kay and Assocs., Inc., B-228434, Jan. 27, 1988, 88-1 CPD ¶ 81. We are unable to perceive any prejudice to MEI in this respect.

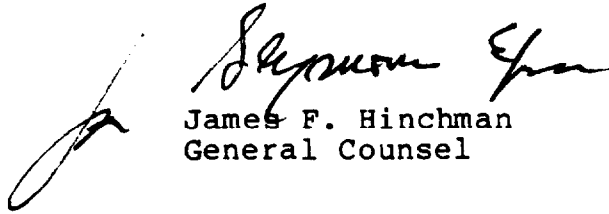
In its original protest, MEI alleged that not all offerors received a full and fair evaluation and that if properly reevaluated, its competitors might have lower scores. In comments to the agency report, MEI notes that the multiple awards which already have been made are for less than the estimated quantities stated in the RFPs and claims that it should have been selected since it proposed to handle 100 percent of the estimated quantities. Even assuming this to be the case, MEI was not prejudiced since its claims are belied by the shortcomings of its proposal and BAFOs. Even though it promised to meet all estimated quantities and requirements, it merely proposed to hire a sufficient number of competent subcontractors to do so.

MEI also apparently contends that the evaluations were biased and conducted in bad faith in order to promote the hiring of former agency employees and prior individual contractors. We find that MEI has failed in its burden of proof. Such allegations require virtually irrefutable proof, since contracting officials are presumed to act in good faith. See Melcare, Inc., B-230876, July 8, 1988, 88-2 CPD ¶ 29. MEI merely infers bad faith and bias based on the identity of the awardees, which is insufficient to prove its claims. See John Crowe & Assocs., Inc., B-227846, Aug. 21, 1987, 87-2 CPD ¶ 194. In any event, since MEI's project director himself is a former HUD employee and its proposal was based on an intention to hire former HUD employees and independent contractors, we perceive no prejudice under the circumstances.

Finally, MEI contends that the agency has violated prohibitions against personal services contracts. A personal services contract is one that by its express terms or as administered makes the contractor personnel appear, in effect, government employees. FAR § 37.101 (FAC 84-40). Agencies are prohibited from awarding personal services

contracts unless specifically authorized by statute. FAR § 37.104 (FAC 84-40). Each contract arrangement is judged in light of its circumstances with the key inquiry being whether the government will exercise relatively continuous supervision and control over contractor personnel. FAR § 37.104(c)(2). We disagree with MEI's contention that by awarding the contracts to individuals, instead of to "businesses" like MEI, the agency has violated the prohibitions. The solicitation did not prohibit individuals (e.g., sole proprietorships) from submitting offers. Further, our review of the record fails to reveal any term in the RFPs or contracts providing for detailed supervision or direction of the contractors' employees. See McGregor FSC, Inc., B-224634, Nov. 7, 1986, 86-2 CPD ¶ 537. Thus, we do not find that the mere award to individuals creates personal services contracts.

Accordingly, the protests are denied in part and dismissed in part. In view of this result, the protester's claim for its proposal preparation and bid protest costs is denied. See 4 C.F.R. § 21.6(d) (1988).



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